

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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BARRY HARRIS,

Plaintiff,

v.

WILLIAM GITTERE, *et al.*,

Defendants.

Case No. 3:22-cv-00053-MMD-CLB

SCREENING ORDER

I. SUMMARY

Pro se Plaintiff Barry Harris, who is incarcerated in the custody of the Nevada Department of Corrections, has submitted a first amended civil rights complaint ("FAC") under 42 U.S.C. § 1983, and has filed an application to proceed *in forma pauperis* ("IFP Application"). (ECF Nos. 1, 9.) The Court now grants the IFP Application and screens Plaintiff's FAC under 28 U.S.C. § 1915A.

II. IFP APPLICATION

Plaintiff's IFP Application is granted. (ECF No. 1.) Based on the information regarding Plaintiff's financial status, the Court finds that Plaintiff is not able to pay an initial installment payment toward the full filing fee under 28 U.S.C. § 1915. Plaintiff will, however, be required to make monthly payments toward the full \$350.00 filing fee when he has funds available.

III. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which an incarcerated person seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the Court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted, or seek monetary relief from a defendant who is

1 immune from such relief. See *id.* §§ 1915A(b)(1), (2). *Pro se* pleadings, however, must
2 be liberally construed. See *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.
3 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential
4 elements: (1) the violation of a right secured by the Constitution or laws of the United
5 States; and (2) that the alleged violation was committed by a person acting under color
6 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

7 In addition to the screening requirements under § 1915A, under the Prison
8 Litigation Reform Act ("PLRA"), a federal court must dismiss an incarcerated person's
9 claim if "the allegation of poverty is untrue" or if the action "is frivolous or malicious, fails
10 to state a claim on which relief may be granted, or seeks monetary relief against a
11 defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a
12 complaint for failure to state a claim upon which relief can be granted is provided for in
13 Federal Rule of Civil Procedure 12(b)(6), and the Court applies the same standard under
14 § 1915 when reviewing the adequacy of a complaint or an amended complaint. When a
15 court dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend
16 the complaint with directions as to curing its deficiencies, unless it is clear from the face
17 of the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
18 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

19 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
20 *Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for failure to
21 state a claim is proper only if it is clear that the plaintiff cannot prove any set of facts in
22 support of the claim that would entitle him or her to relief. See *Morley v. Walker*, 175 F.3d
23 756, 759 (9th Cir. 1999). In making this determination, the Court takes as true all
24 allegations of material fact stated in the complaint, and the Court construes them in the
25 light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957 (9th
26 Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards than
27 formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980). While
28 the standard under Rule 12(b)(6) does not require detailed factual allegations, a plaintiff

1 must provide more than mere labels and conclusions. See *Bell Atl. Corp. v. Twombly*,
 2 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of action is
 3 insufficient. See *id.*

4 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
 5 that, because they are no more than mere conclusions, are not entitled to the assumption
 6 of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal conclusions can provide
 7 the framework of a complaint, they must be supported with factual allegations.” *Id.* “When
 8 there are well-pleaded factual allegations, a court should assume their veracity and then
 9 determine whether they plausibly give rise to an entitlement to relief.” *Id.* “Determining
 10 whether a complaint states a plausible claim for relief . . . [is] a context-specific task that
 11 requires the reviewing court to draw on its judicial experience and common sense.” *Id.*

12 Finally, all or part of a complaint filed by an incarcerated person may be dismissed
 13 *sua sponte* if that person’s claims lack an arguable basis either in law or in fact. This
 14 includes claims based on legal conclusions that are untenable (e.g., claims against
 15 defendants who are immune from suit or claims of infringement of a legal interest which
 16 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
 17 fantastic or delusional scenarios). See *Neitzke v. Williams*, 490 U.S. 319, 327-28 (1989);
 18 see also *McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

19 **IV. SCREENING OF FAC**

20 In his FAC, Plaintiff sues multiple Defendants for events that took place while
 21 Plaintiff was incarcerated at High Desert State Prison and Ely State Prison. (ECF No. 9
 22 at 1-2.) Plaintiff sues Defendants Warden William Gittere, Deputy Director Assistant B.
 23 Williams, and the State of Nevada.¹ (*Id.* at 2-3.) Plaintiff brings one claim and seeks
 24 monetary and injunctive relief. (*Id.* at 5, 7.)

25 Plaintiff alleges the following. On April 27, 2021, after prison officials found Plaintiff
 26 guilty of a prison violation, he appealed. (*Id.* at 5.) At the disciplinary hearing, prison

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 28 ¹The Court dismisses with prejudice all claims against Defendant State of Nevada,
 as amendment would be futile. See *Will v. Michigan Dep’t of State Police*, 491 U.S. 58,
 65 (1989) (holding that states are not persons for purposes of § 1983).

1 officials sanctioned Plaintiff to 365 days² in segregation, transferred him to a different
2 prison, and referred Plaintiff to the Attorney General's Office to face charges. (*Id.*)
3 According to Plaintiff, this has imposed a greater hardship on him in relation to the
4 ordinary incidents of prison life and the length of his sentence. (*Id.*) Although Gittere
5 acknowledged errors in the disciplinary hearing, Gittere violated Plaintiff's rights by
6 refusing to give Plaintiff the remedy he sought. (*Id.* at 6.) Williams also repeated Gittere's
7 errors. (*Id.*) Plaintiff wants his sanctions and outside charges dismissed. (*Id.* at 7.) Plaintiff
8 alleges violations of his Fourteenth Amendment due process rights. (*Id.* at 5.)

9 To the extent that Plaintiff is suing Gittere and Williams for due process violations
10 related to the denial of his appeal, Plaintiff fails to state a claim. As the Court explained
11 to Plaintiff in the original screening order (ECF No. 5 at 4-5), prisoners have no stand-
12 alone due process rights related to the administrative grievance process. *See Mann v.*
13 *Adams*, 855 F.2d 639, 640 (9th Cir. 1988) (holding that a state's unpublished policy
14 statements establishing a grievance procedure do not create a constitutionally protected
15 liberty interest); *Ramirez v. Galaza*, 334 F.3d 850, 860 (9th Cir. 2003) (holding that there
16 is no liberty interest in the processing of appeals because there is no liberty interest
17 entitling inmates to a specific grievance process). Again, the Court dismisses this claim
18 with prejudice as amendment would be futile. (*Id.*)

19 The Court now addresses Plaintiff's procedural due process claim and his
20 disciplinary hearing. To state a cause of action for deprivation of procedural due process,
21 a plaintiff must first establish the existence of a liberty interest for which the protection is
22 sought. *See Sandin v. Conner*, 515 U.S. 472, 487 (1995). In *Sandin*, the Supreme Court
23 held that a prisoner has a liberty interest when confinement "imposes [an] atypical and
24 significant hardship on the inmate in relation to the ordinary incidents of prison life." *Id.* at
25 484. In *Sandin*, the Supreme Court focused on three factors in determining that the
26 plaintiff possessed no liberty interest in avoiding disciplinary segregation: (1) disciplinary

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28 ²In the FAC, Plaintiff states that he was sanctioned to "365 months," but then
attaches an exhibit that states "365 days." (ECF No. 9 at 5, 15.) The Court interprets the
allegations as "days" rather than "months."

1 segregation was essentially the same as discretionary forms of segregation; (2) a
2 comparison between the plaintiff's confinement and conditions in the general population
3 showed that the plaintiff suffered no "major disruption in his environment;" and (3) the
4 length of the plaintiff's sentence was not affected. *Id.* at 486-87.

5 When a protected liberty interest exists and a prisoner faces disciplinary charges,
6 prison officials must provide the prisoner with (1) a written statement at least 24 hours
7 before the disciplinary hearing that includes the charges, a description of the evidence
8 against the prisoner, and an explanation for the disciplinary action taken; (2) an
9 opportunity to present documentary evidence and call witnesses, unless calling witnesses
10 would interfere with institutional security; and (3) legal assistance where the charges are
11 complex or the inmate is illiterate. *See Wolff v. McDonnell*, 418 U.S. 539, 563-70 (1974).

12 "When prison officials limit an inmate's efforts to defend himself, they must have a
13 legitimate penological reason." *Koenig v. Vannelli*, 971 F.2d 422, 423 (9th Cir. 1992). An
14 inmate's right to present witnesses may legitimately be limited by "the penological need
15 to provide swift discipline in individual cases . . . [or] by the very real dangers in prison life
16 which may result from violence or intimidation directed at either other inmates or staff."
17 *Ponte v. Real*, 471 U.S. 491, 495 (1985). Prison officials "must make the decision whether
18 to allow witnesses on a case-by-case basis, examining the potential hazards that may
19 result from calling a particular person." *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir.
20 2003). Despite this, an inmate has no right to cross-examine or confront witnesses in
21 prison disciplinary hearings. *See Wolff*, 418 U.S. at 567-68.

22 "[T]he requirements of due process are satisfied if some evidence supports the
23 decision by the prison disciplinary board." *Superintendent, Mass. Corr. Inst., Walpole v.*
24 *Hill*, 472 U.S. 445, 455 (1985).

25 The Court finds that Plaintiff fails to state a colorable due process claim based on
26 the disciplinary hearing. Even if Plaintiff establishes a liberty interest, he does not allege
27 that his disciplinary hearing failed to include any of the procedural requirements described
28 in *Wolff*. *See* 418 U.S. at 563-70. Even though Plaintiff states that Gittere and Williams

1 acknowledged that “errors” occurred during the disciplinary hearing, Plaintiff does not
2 identify the errors. (ECF No. 9 at 6.) Thus, Plaintiff fails to state a colorable procedural
3 due process claim based on his disciplinary hearing.

4 The Court also finds that leave to amend is not warranted. In the original screening
5 order, the Court granted Plaintiff leave to amend on this claim. (ECF No. 5 at 5-6.)
6 However, upon amendment, Plaintiff still has not stated a colorable claim. *See Zucco*
7 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1007 (9th Cir. 2009) (leave to amend not
8 required when plaintiff was previously allowed to amend but failed to correct identified
9 deficiencies).

10 Although Plaintiff did not describe the errors of his disciplinary hearing in the FAC,
11 he attaches several exhibits that purport to explain the errors. (ECF No. 9 at 6, 12-32.)
12 The Court has reviewed the exhibits and notes that the errors Plaintiff references are
13 unrelated to the procedural due process requirements described in *Wolff*. *See* 418 U.S.
14 at 563-70. Instead, the alleged errors appear to deal with delays in the disciplinary
15 hearing, typos in the disciplinary forms, and discontent with the hearing officer’s decision
16 not to review “all available evidence” after the evidence reviewed supported a guilty
17 finding. (*Id.* at 13.) Even if Plaintiff had raised these errors explicitly in his FAC, they would
18 not establish a claim for procedural due process violations. The Court dismisses the
19 Fourteenth Amendment due process claim with prejudice as amendment would be futile.

20 **V. CONCLUSION**

21 It is therefore ordered that Plaintiff’s application to proceed *in forma pauperis* (ECF
22 No. 1) without having to prepay the full filing fee is granted. Plaintiff will not be required to
23 pay an initial installment fee. Nevertheless, the full filing fee will still be due, under 28
24 U.S.C. § 1915, as amended by the Prison Litigation Reform Act. The movant herein is
25 permitted to maintain this action to conclusion without the necessity of prepayment of fees
26 or costs or the giving of security therefor.

27 It is further ordered that, under 28 U.S.C. § 1915, as amended by the Prison
28 Litigation Reform Act, the Nevada Department of Corrections will forward payments from

1 the account of Barry Harris, #95363 to the Clerk of Court, 20% of the preceding month's
2 deposits (in months that the account exceeds \$10.00) until the full \$350 filing fee has
3 been paid for this action. The Clerk of Court is directed to send a copy of this order to the
4 Finance Division of the Clerk's Office. The Clerk of Court is directed to send a copy of this
5 order to the attention of Chief of Inmate Services for the Nevada Department of
6 Corrections, P.O. Box 7011, Carson City, NV 89702.

7 It is further ordered that, even though this action is dismissed, or is otherwise
8 unsuccessful, the full filing fee will still be due, under 28 U.S.C. §1915, as amended by
9 the Prison Litigation Reform Act.


10 It is further ordered that the operative complaint is the FAC (ECF No. 9). The Clerk
11 of Court is directed to send Plaintiff a courtesy copy of the FAC.

12 It is further ordered that the FAC (ECF No. 9) is dismissed with prejudice, as
13 amendment would be futile, and for failure to state a claim.

14 The Clerk of Court is directed to close the case and enter judgment accordingly.

15 It is further ordered that the Court certifies that any *in forma pauperis* appeal from
16 this order would not be taken "in good faith" under 28 U.S.C. § 1915(a)(3).

17 DATED THIS 26th Day of August 2022.

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21 MIRANDA M. DU
22 CHIEF UNITED STATES DISTRICT JUDGE
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